IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5688

TRACY LEE HUDSON,

Petitioner,

v.

THE STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE AND CONSENT

The State Public Defender of California is an agency of California State Government which is charged with the representation on appeal of indigent criminal defendants. The outcome of the instant case will have substantial impact upon the rights of many persons being represented by this office, as well as upon the public as a whole, to be free from double jeopardy. An outcome in petitioner's favor will also tend to reduce judicial trial and appellate backlogs, and will thus work substantial

benefit for the administration of justice in general. Accordingly, the State Public Defender of California is filing this brief amicus curiae in support of the petitioner herein.

This brief is filed pursuant to Rule 42 of the Rules of this Court. Consent to the filing of the brief has been given by Mr. Richard O. Burst, Sr., Esquire, and by Mr Henry N. Brown, Jr., District Attorney for the 26th Judicial District of the State of Louisiana, counsel for petitioner and respondent, respectively. Letters reflecting such consent have been forwarded to the Clerk of this Court under separate cover, and should be on file in his office.

INTRODUCTION

In the case before the Court, a jury verdict of guilty was set aside upon a finding by the trial court that "I'm convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict. . ." (*State* v. *Hudson* (1979) 373 So.2d 1294, 1295.)

After a second trial, at which the state offered the testimony of a new eyewitness who had not been produced at the first trial, petitioner was again found guilty. He contended that the second trial was barred by the Double Jeopardy Clause and by this Court's decision in *Burks* v. *United States* (1978) 437 U.S. 1. The Louisiana Supreme Court, however, held that because the first verdict was set aside upon a motion for a new trial, and due to its willingness to characterize the trial court's ruling as a finding of "insufficient" rather than nonexistant evidence, *Burks* did not apply.

Amicus files this brief because in California, as in Louisiana, a motion for a new trial is the sole vehicle for obtaining the trial judge's review of the evidence after a verdict has been returned; neither state has a post-verdict equivalent to Rule 29.[1] Amicus urges that an exception to *Burks* in this case is not justified. The fact that the ruling is issued by a trial court rather than an appellate court is irrelevant, and the fact that the ruling came in response to a motion for new trial rather than to a request for a judgment of acquittal can have no legal effect. To hold otherwise would merely thwart the purposes of the Double Jeopardy Clause and harm the cause of judicial economy by forcing cases such as this to proceed through time consuming and costly appeals.[2] Both goals are best served by a decision in the instant case which would favor the prompt and final termination of non-meritorious prosecutions.

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[1] Federal Rules Crim. Procedure, Rule 29 (18 U.S.C.A.).

[2] In 1977–78, out of 55,532 felony filings, there were 5,823 contested trials in California. 3,284, or 56% of these matters went on to appeal. Only 153 motions for new trial were granted by trial courts, which amounts to 2.6% of contested matters or three-tenths of one percent of all filings. (Data extrapolated from California Administrative Office of the Courts, *Annual Report* (1979) table X-A, p. 56; table XVII, p. 63; and table XX, p. 73.)

The number of motions for new trial granted was supplied to us by the Administrative Office of the Courts by means of a letter dated August 8, 1979.

I

THE RULE OF *BURKS* V. *UNITED STATES* SHOULD BAR RETRIAL OF A CASE WHERE THE EVIDENCE SUPPORTING A VERDICT IS FOUND LEGALLY INSUFFICIENT BY THE TRIAL COURT

In *Burks* v. *United States* (1978) 437 U.S. 1, this Court held that the Double Jeopardy Clause bars a retrial where an appellate court has determined that the evidence introduced at trial is insufficient to sustain the verdict. The holding was based on this Court's observation that an appellate court, in reviewing the sufficiency of the evidence, applies the same standards as would a trial court in ruling on a motion for judgment of acquittal. (See Rule 29, Federal Rules of Criminal Procedure [18 USCA]):

> "The importance of a reversal on grounds of evidentiary insufficiency for purposes of inquiry under the Double Jeopardy Clause is underscored by the fact that a federal court's role in deciding whether a case should be considered by a jury is quite limited. Even the trial court, which has heard the testimony of witnesses firsthand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal [citations omitted]. The prevailing rule has long been that a district judge is to submit the case to the jury if the evidence and inferences therefrom would warrant the jury's finding the defendant guilty beyond a reasonable doubt [citations omitted]. Obviously a federal appellate court applies no higher standard; rather, it must sustain the verdict if there is substantial evidence,

> viewed in the light most favorable to the Government, to uphold the jury's decision. . ." (437 U.S. at 17.)

Since a reviewing court in these circumstances does no more than hold that the defendant was entitled to an acquittal in the trial court in the first instance, the decision of the reviewing court should have the same effect, for purposes of the Double Jeopardy Clause, as an acquittal.

In *Greene* v. *Massey* (1978) 437 U.S. 19, decided the same day, this Court applied *Burks* to the states, following *Benton* v. *Maryland* (1969) 395 U.S. 784, and held that the State of Florida could not retry a defendant where that state's highest court had found "that the evidence was definitely lacking in establishing beyond a reasonable doubt" that the defendants were guilty of the crime charged. (437 U.S. at 20–21.)

This Court, it must be noted, did not analyze the standard of review which the Florida court was using, and perforce did not find that the Florida court was using the very limited standard of federal appellate review which the Court of Appeals had used in *Burks*. The *Greene* decision was based simply on the premise that the reversal was based on an appellate determination that the evidence was "insufficient." (437 U.S. at p. 24.)[3]

This case presents the issue whether *Burks* and the Double Jeopardy Clause apply to bar a retrial when a

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[3] Florida decisional law, however, seems clear that neither trial nor appellate courts are empowered to overturn jury verdicts which are supported by sufficient evidence because of mere personal disagreement. (See *State* v. *Bowle* (Fla. 1975) 318 So.2d 407.)

verdict is set aside for evidentiary insufficiency, when the order setting it aside is not characterized under state law as a judgment of acquittal, but when it is clear that the court which set aside the verdict was applying an "appellate" standard to scrutinize the sufficiency of evidence. *Amicus* submits that this case—particularly in light of the standard of appellate review just articulated in *Jackson* v. *Virginia* (1979) 433 U.S. 307—presents no basis in law or logic for carving out an exception to the *Burks* rule based on the fact that a finding of insufficiency was made by a trial court as opposed to an appellate court.

Certainly the fact that the court's order was characterized as an order for a new trial rather than as a judgment of acquittal does not in itself take the case outside the rule of *Burks* (see Argument I-A, *infra*). Nor can it be assumed that an order for a new trial is based on some standard of evidentiary review which is radically different from the appellate review which had occurred in *Burks* and *Greene*, as recently rearticulated in *Jackson*.

A. As This Court Has Very Recently Articulated A Standard Of Appellate Review For Sufficiency Of The Evidence, It Is Not Clear Whether The States Have Adopted This Standard As The Criterion For Distinguishing Between A New Trial And A Judgment of Acquittal.

Last year, in *Jackson* v. *Virginia* (1979) 443 U.S. 307 [61 L.Ed.2d 560] this Court held that a criminal defendant on appeal is entitled to the reviewing court's scrutiny of *all the evidence* in the trial record, and to that court's determination as to whether record evidence could *rea-*

sonably support a finding of guilt (61 L.Ed.2d at 573). This Court rejected the view that "the beyond-a-reasonable-doubt standard is merely descriptive of the state of mind required of the factfinder in a criminal case, and not of the actual quantum and quality of proof necessary to support a criminal conviction" (*Ibid.*), and simultaneously rejected the "no evidence" rule of *Thompson* v. *Louisville,* 326 U.S. 199:

> "That the Thompson 'no evidence' rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt is readily apparent. '[A] mere modicum of evidence may satisfy a 'no evidence' standard . . . [citation] Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf. Fed. Rule Evid. 401—could be deemed a 'mere modicum'. But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt. The *Thompson* doctrine simply fails to supply a workable or even a predictable standard for determining whether the due process command of *Winship* has been honored.' " (61 L.Ed.2d at 574.)

Although this Court held that its "reasonable jury" criterion was not "novel", but rather was consistent with the manner in which its earlier decision in *Glasser* v. *United States* (1941) 315 U.S. 60, 80, had been interpreted in the courts of appeal (61 L.Ed.2d at 573) it is by no means certain that this statement can be applied to the state courts as well. While there is indeed a long line of federal cases which have applied a "reasonable juror"

test in reviewing the sufficiency of the record evidence, it appears that a number of states have been applying a test much closer to that of *Thompson* than that of *Jackson* in deciding when a judgment of acquittal should be entered. (See for example, *State* v. *Jensen* (Idaho, 1972) 501 P.2d 727; *Medious* v. *State* (Miss. 1979) 375 So.2d 405; Oregon Const. Art. VII, § 3: ". . . no fact tried by a jury shall be otherwise reexamined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict".)

The case now before the Court presents a classic example of a pre-*Jackson* state legislative scheme under which a defendant is protected from a retrial only when the evidence (or lack thereof) at the first trial meets the *Thompson* standard of insufficiency. As the Court below said,

> "This Court has recognized that when it finds on review that in a prior trial there was *no evidence* of the crime charged or an essential element thereof, *Burks* precludes a retrial, and a verdict of acquittal must be entered . . . the question in the instant case is whether *Burks* compels the same result where the trial judge grants a motion for *insufficient evidence* as opposed to granting the motion on the ground of *no evidence* . . . we believe the holding in *Burks* (precluding a second trial) is limited to those cases where, *as a matter of law,* a reviewing court has determined that in a prior trial there was no evidence of the crime charged or an essential element thereof." (373 So.2d at 1297; emphasis in original.)

With the scope of constitutionally mandated appellate

review now considerably broader than that contemplated by *Thompson*[4] it is clear that many state courts which review trial evidence and find that it is "insufficient evidence" are exercising an appellate form of review—whether or not they believe this to be their mandate under state law. A California court, for example, in ruling on a new trial motion under the test set forth in *People* v. *Robarge*, (1953) 41 Cal.2d 628, 633; 262 P.2d 14, may once have been able to distinguish its function from that of an appellate court upon review—but the reason it would be able to make this distinction is that at the time *Robarge* was decided, the California standard of appellate review was essentially a *Thompson* standard. See e.g., *People* v. *Newland* (1940) 15 Cal.2d 678, 681; 104 P.2d 778: "The court on appeal will not attempt to determine the weight of the evidence . . . "

For example, in *Vietch* v. *Superior Court* (1979) 89 Cal.App.3d 722, 152 Cal.Rptr. 822, Cert. Den._____ U.S. _____, decided some months before *Jackson* v. *Virginia, supra*, a California appellate court held that *Burks* does not apply to a grant of a new trial for insufficient evidence. The basis for this holding was that the trial court was empowered to exercise *Jackson*-like power in re-

[4] Although, as noted above, the *Jackson* opinion rejected the idea that it was creating a "novel" criterion, this conclusion was based on federal rather than state appellate decisions. It is clear that the recent *Jackson* opinion *does* make a distinct leap from the *Thompson* standard which many states have retained. It holds that *Thompson* "is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt . . ." (61 L.Ed.2d at 574.) *Thompson*, in fact, did not even address a due process right of evidentiary sufficiency; *Jackson*, following *In re Winship* (1970) 397 U.S. 358, did (61 L.Ed.2d at 570.)

viewing *all* the evidence, whereas the appellate court could only determine if there was *any* evidence. (89 Cal.App.3d at 726.) Whatever validity such a distinction may have had prior to the announcement of *Jackson* v. *Virginia*, it is clear that given *Jackson*, the scope of review on a motion for new trial is identical to that on appeal. (*People* v. *Johnson* (1980) 26 Cal.3d 557,_____ Cal.Rptr._____: " . . . the court does not, however, limit its review to the evidence favorable to the respondent . . . [W]e must resolve the issue in light of the *whole record*."

1. Although In Many States The Standard For Setting Aside A Verdict, Whether By Judgment Of Acquittal Or By An Order For A New Trial, Is Not Clearly Articulated, It Is Clear That Most States Do Not Allow Either Form Of Relief Unless The Evidence Is Insufficient Within The Meaning Of *Jackson* v. *Virginia*

As we shall elaborate, the overwhelming majority of American jurisdictions do not permit a trial judge to set aside a jury's verdict—with or without a new trial—unless, as here, that verdict is unsupported by substantial evidence. Should a case ever be presented to the Court where a trial judge has plainly overturned a verdict under state laws empowering him to act as a "thirteenth juror", it can be decided whether the *Burks* rule should apply to bar retrial. It likely will be some time before such a case appears, however, since few states empower their judges to act as thirteenth jurors, and since any overstepping of authority in a particular case can be constitutionally cured by an appeal seeking to reinstate the verdict. (*United States* v. *Wilson* (1975) 420 U.S. 332.)

It is true that a literal reading of many state statutes would, on first impression, suggest that these states have given their trial judges broad and sweeping powers to set aside a verdict and order a new trial where entry of judgment is "unfair" (Indiana Rules of Trial Procedure, T.R. 50) or "contrary to the weight of the evidence" (N.C. Gen. Stat. 15A-1414(b) (27)), or "not justified by the evidence" (Minnesota Rules Crim. Proc., Rule 26.04, subdv. 1). A statutory provision that a new trial may be granted "where the verdict is contrary to law or evidence" is found in many states (see for example, California Penal Code section 1181(6); Idaho Code Section 19-2406(6); Tex. Code Crim. Proc. Ann. Art. 40.03; Okla. St. Ann. section 952; Iowa Code Ann. section 813.2, rule 23; and Wash. Rev. Code Ann. section 10.67.010, which limits to two the number of new trials which may be granted on this basis.) The language of Federal Rule 33 has been adopted by a large group of states ("The Court on motion of a defendant may grant a new trial to him if required in the interest of justice." (F.R.Crim.P. rule 33; N.Dak.R.Crim.P. rule 33). And there are also a number of states whose new trial statutes do not fall clearly into any category (Ga. Code Ann. § 70-206: a new trial may be granted if the verdict is "decidedly and strongly against the weight of the evidence;" Illinois Ann. St. § 116-1: no standard specified; Connecticut G.S.A. § 54-95: no standard specified.).

It is also true that judicial construction of the new trial statutes, especially where this arises (as it frequently does) in the context of appellate deference to the trial

judge's discretion, sometimes purports to grant extremely broad powers indeed to the trial court to set aside a verdict "to best serve the interests of justice." (*Commonwealth* v. *Brown* (1960) 192 Pa.Super. 498, 162 A.2d 13.)

However, few states of which *amicus* is aware have, in actual practice, given their judges powers comparable to that of a federal judge in ruling on a Rule 33 motion. Federal construction of Rule 33 has allowed extremely broad latitude to trial judges in granting new trials, and in fact several federal decisions have explicitly adopted a "thirteenth juror" rule. (See *United States* v. *Narciso* (E.D. Mich. 1977) 446 F.Supp. 252, 303, and cases cited therein.) But by contrast, many state judicial interpretations of rules equivalent to Rule 33 have read the same language as allowing a much narrower scope of review to the trial judge. (See *People* v. *Emerson* (Colo. 1972) 500 P.2d 368.)

Other states as well have clearly declined to give trial judges the power of a "thirteenth juror" in deciding whether to order a new trial. The Florida Supreme Court, for example, in construing its new trial rule (Fla. Stat. Ann. R.Crim.P. Rule 3.580) has held, in reversing a new trial order, that "The record reflects that the order was predicated primarily upon the trial court's own view of the evidence, in particular, lack of proof of intent . . . A trial judge is not permitted to sit as a seventh juror with veto power pitting his judgment against that of the jury. . ." (*State* v. *Bowle* (1975) 318 So.2d 407.) Washington so provides by statute, Wash. Rev. Code

Ann. 10.67.010; *State* v. *Collins* (1967) 435 P.2d 538. California has done so by construction in *People* v. *Robarge, supra,* at 633.

Under the laws of some other states, the difference between the standard of review for entering a judgment of acquittal and for granting a new trial is articulated poorly, if at all. As a result, new trial orders can be issued in such jurisdictions to remedy a multitude of sins at the first trial—including all degrees of evidentiary insufficiency, from the judge's personal disbelief of a prosecution witness [5] up to complete failure of proof by the prosecution.[6] In these states, therefore, the fact that a new trial is ordered because there was insufficient evidence gives no clue as to *how* insufficient the evidence was unless, as here, there is an elaboration of reasons entered into the record by the court.

More significantly, where the distinction between the two standards has been articulated,[7] many states have,

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[5] See, for example, *People* v. *Ramos* (1970) 33 A.D.2d 344, 308 N.Y.S.2d 195, construing N.Y. Crim. Pro. Law § 330.30.

[6] Missouri, for example, appears not to distinguish the standard of evidentiary insufficiency required for a new trial from that required for a judgment of acquittal. See Mo. Ann. Stat. (Vernon) § 547.020, *State* v. *Russell* (Mo., 1959) 324 S.W.2d 727; *State* v. *Carroll* (Mo. 1933) 62 S.W.2d 863, 867. Illinois also has failed to develop a distinction, see *People* v. *Smith* (Ill. App. 1977) 359 N.E.2d 228.

[7] Most of the federal-rules states, and some others as well, have drawn a distinction between the standard for a judgment of acquittal and the standard for ordering a new trial; some have even acknowledged that the Double Jeopardy Clause compels them to do so. See, for example, Vermont R.Cr.P. Rule 33; Pa.R. Crim.P. Rule 1123, and *Commonwealth* v. *Meadows* (1977) 471 Pa.201, 369 A.2d 1266; Michigan M.C.L. § 770.1; M.S.A. § 28.1098; *People* v. *Hampton* (Mich. 1979) 285 N.W.2d 284.

For an example of a case which addresses the Double Jeopardy question but fails to hold squarely that *Burks* and *Jackson* bar a retrial whenever the whole record at the first trial is insufficient to see *People* v. *Hampton* (Mich. 1979) 285 N.W.2d 284, cert. pending, No. 79-1446.)

as here, failed to require that a judgment of acquittal rather than a new trial be ordered when the evidence fails to meet the test of legal sufficiency.

In the wake of *Burks,* one state court has correctly determined that a claim that the evidence is legally insufficient *must* be reached if it is argued in a post-trial motion or on appeal (*People* v. *Taylor* (Ill. 1979) 391 N.E.2d 366), and it has also been held that the decision as to legal sufficiency determines whether a judgment of acquittal or a new trial should be ordered (*State* v. *McMorrow* (N.D. 1979) 286 N.W.2d 284, overruling *State* v. *Holy Bull* (N.D. 1975) 238 N.W.2d 52.) However, in the vast majority of states it is by no means clear that a judgment of acquittal and *not* a new trial, must be ordered by the trial court whenever the evidence at the first trial fails to meet the test of sufficiency set out in *Jackson* v. *Virginia, supra* at 307.[8]

Whatever the constitutional ramifications of a new trial granted on "thirteenth juror" grounds, it suffices that the trial judge in the present case was clearly exercising an appellate type of review when he stated that: "I'm convinced there was *no evidence,* certainly not evidence beyond a reasonable doubt, to sustain the verdict. . ." (373 So.2d at 1295 [emphasis added].) And in most other states as well, trial judges are exercising an "appellate" function rather than a "thirteenth-juror"

[8] North Carolina, for example, has a "Motion for Appropriate Relief" which may be made for varying degrees of evidentiary insufficiency. (N.C.G.S. 15A-1414.) Minnesota requires that a motion for judgment of acquittal be joined with a new trial motion. (27A Minn. Stat. Ann., R.Crim.Proc. Rule 26.04, subd. 3.)

function when they set aside a verdict for insufficient evidence and order a new trial. Certainly in California the "thirteenth-juror" definition of a trial judge's function has been decisively rejected. (*People* v. *Robarge, supra,* at 628.) The California Supreme Court observed in *Robarge* that:

> "While it is the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed. . . This does not mean, however, that the court should decide what result it would have reached if the case had been tried without a jury. . ." (41 Cal.2d at 633.)[9]

Thus, in this case, and in the vast majority of similar cases which are likely to arise, the order for a new trial is based on a review of the evidence which is comparable to the appellate function, rather than an invasion of the jury's function.

2. The Policy And Reasoning Of *Burks* Clearly Extend To A New Trial Order Based On The Insufficiency Of The Evidence

The history of law and policy which underlie the *Burks* decision dictate that *Burks* should apply to new-trial orders such as Louisiana's and California's. Although the holding of *Burks* was a narrow one—that the Double Jeopardy Clause bars a retrial where the evidence at the first trial was insufficient under the standard of federal appellate review—the reasoning on which it was based applies with full force in the present case.

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[9] *Robarge* is regarded as providing the controlling definition of a trial judge's powers on motion for new trial. (See *People* v. *Montgomery* (1976) 61 Cal.App.3d 718, 730, 132 Cal.Rptr. 558.)

Burks rested on a rejection of the "waiver" theory as the constitutional justification for retrials after appellate reversals. (437 U.S. 10, 17.) It acknowledged frankly that the decision as to whether a defendant may be retried after a successful appeal or post-trial motion is made by weighing competing considerations, and not by presuming that the Double Jeopardy protection has been waived by the appeal or motion.

These competing considerations are, of course, the defendant's constitutionally based interest in being free from repeated prosecutions, and society's interest in convicting the guilty when it has produced sufficient evidence of guilt.[10] Where the reversal is based on evidentiary insufficiency, the considerations in favor of allowing the prosecution a retrial vanish; the state has had a chance, in a presumably error-free trial, to prove its case and it has failed. As an accused is not being set free due to errors which have no bearing on the issue of his guilt, the "error" of evidentiary insufficiency goes straight to the ultimate issue. (*See* Double Jeopardy: A New Trial After Appellate Reversal For Insufficient Evidence, 31 U.Chi.L.Rev. 365, 370 (1964).)

The well-known considerations *against* compelling the defendant to undergo a second trial, by contrast, are as strong or stronger when the reversal is for evidentiary insufficiency. Under these circumstances, the danger of harassment from repeated efforts to convict does become a real threat; it has long been acknowledged that ". . . the state with all its resources and power

[10] "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." (*United States* v. *Tateo* (1964) 377 U.S. 463, 466.)

should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty." (*Green* v. *United States* (1957) 355 U.S. 184, 187–188.)

More important, the chances of a conviction are greatly enhanced on retrial, both through a simple increase in mathematical probability and also because the prosecution can always do a better job the second time around, particularly after it has been put on notice of the deficiencies of its first presentation. Such is precisely what occurred here, when the state pulled a new witness out of its hat at petitioner's second trial.

> "For instance, if the evidence were such that one in four juries would convict and three in four acquit, the probability of conviction if the defendant is tried once is, of course, one in four (4/16). If two trials were permitted the defendant would have to convince two juries of his innocence and the probability of one of the two convicting would be 1—(3/4 x 3/4) = (7/16); assuming the independence of each jury and the absence of other variables. If he had to convince five juries his probability of conviction by one would rise over three in four." Note, Twice in Jeopardy, 75 Yale L.J. 262, N. 74 at 278 (1965).[11]

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[11] See, for example, *Ashe* v. *Swenson* (1970) 397 U.S. 436, 477: "In this case the state in its brief has frankly conceded that following the petitioner's acquittal, it treated the first trial as no more than a dry run for the second prosecution. . . But this is precisely what the constitutional guarantee forbids."

The California Supreme Court also has found, in its most recent decision on the scope of the double jeopardy clause that "[w]ithout the guarantee against double jeopardy, the chances of convicting innocent persons would be increased, both because the state would have unlimited opportunities to prosecute an acquitted defendant and because the exposure of the accused's defense in the first trial would provide the state with a major advantage in preparing for the second. (*See generally,* Schulhofer, Jeopardy and Mistrials (1977) 125 U.Pa.L. Rev. 449, 508–511" (*Larios* v. *Superior Court* (1979) 24 Cal.3d 324, 329, 155 Cal.Rpt. 374.)

Since the major effect of allowing repeated trials after a finding of evidentiary insufficiency at the first is to increase the chances of convicting the innocent, clearly no social interest in convicting the guilty is present here to offset the harassment, anxiety, and increasing risk of injustice to the defendant.

This balance of the defendant's interests and society's is not changed when the reversal of the first conviction is for insufficient evidence instead of for no evidence. In either case, the state has failed to meet the burdens imposed upon it by law to prove the defendant's guilt beyond a reasonable doubt. In both cases, the state is, in effect, given a free dress rehearsal of its case, a chance to patch up any weaknesses or contradictions in its own evidence and even—as in the present case—a chance to produce entirely new witnesses, with no explanation as to why they were not produced at the first trial, after it has heard and evaluated the defense case.[12]

B. That The Defendant And Trial Court Contemplated A New Trial Is Not Conclusive On The Issue Of Double Jeopardy

This Court has recognized that, in enforcing the constitutional bar against double jeopardy, it must look beyond the form to the substance of the order which terminates the initial trial or sets aside the initial verdict (*United States* v. *Martin Linen Supply Co.* (1977) 430 U.S. 564, 571.) Nor may enforcement of the constitutional right depend on the trial judge's intention in setting aside a verdict: "The fact that the trial judge contemplates that there will be a new trial is not conclusive on the issue of double jeopardy." (*United States* v. *Scott* (1978) 437 U.S. 82, 92.) Thus, cases which have held that

[12] See *Larios* v. *Superior Court, supra,* fn. [11], *ante.*

a new trial is constitutionally permitted simply on the grounds that the defendant asked for this remedy, rather than for a judgment of acquittal or for a directed verdict (e.g., *United States* v. *Parks* (5th Cir., 1972) 460 F.2d 736, 745; *State* v. *Holy Bull* (N.Dak. 1975) 238 N.W.2d 52, 54–55) can no longer be followed in light of *Burks:*

> "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial." (437 U.S. 1, 17.)

Particularly where a new trial motion is the only means available to a defendant to obtain review of the sufficiency of the evidence, it is manifestly unfair to construe his request for a new trial as a waiver of his right not to be placed twice in jeopardy. Petitioner in his brief has shown that under Louisiana law, a motion for a new trial is the first and only legal vehicle provided a defendant to raise the issue of insufficient evidence before the trial court; thus the fact that the court *grants* a new trial motion obviously cannot be construed to mean that it has *rejected* a defendant's claim that the record evidence does not meet the standard of legal sufficiency.[13]

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[13] The Louisiana Supreme Court itself acknowledged that the question whether double jeopardy bars a retrial must be decided by looking at what standard of evidentiary review the judge applied, and *not* by looking at his characterization of the order: ". . . The contention that there was no evidence of the crime charged or an essential element thereof may properly be raised solely by a motion for new trial [citation omitted.] Thus if a trial judge granted a motion for new trial on the gounds of no evidence of the crime charged or an essential element thereof, *Burks, supra*, and our holding in *Thompson* [366 So. 2d 1291 (La., 1978)] would require the trial judge to enter a verdict of acquittal." (373 So. 2d 1297.)

Amicus points out that under California law, a similar problem arises: although California does allow for a ruling which is characterized as a "judgment of acquittal" if the trial evidence fails to meet the standard of legal sufficiency,[14] this ruling can only be entered *before* the case is submitted to the jury for a decision.[15] Once a jury verdict is returned, a trial judge can only act under Penal Code section 1181—the new trial statute.[16]

Thus, a cautious judge who chooses to wait until the jury verdict is in before ruling on the legal sufficiency of the evidence would find himself barred from giving the defendant the relief to which he is entitled under the double jeopardy clause.[17]

It is hard indeed to conceive of a case in which a failure of proof would not have been apparent to the court in time to grant a final judgment of acquittal prior to submission of the case to the jury. But under both California's and Louisiana's statutory schemes, a criminal defendant legally entitled to an acquittal will lose substantial rights simply because the trial judge—who never should have allowed the case to be submitted to

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[14] California Penal Code section 1118.1.

[15] California Penal Code section 1118.2.

[16] Penal Code section 1181 (6) authorizes the granting of a new trial "where the verdict of finding is contrary to law or evidence."

[17] By contrast the federal courts and most states which have adopted the Federal Rules of Criminal Procedure retain the power to acquit following the submission of a case to a jury. (F.R.C.P. Rule 29(b) (18 U.S.C.A.; see also, for example, Vermont, V.R.Cr.P. 29; South Dakota, S.D. Compiled Laws Ann. 23A-29-2; Ohio Crim.R.29(B); Colorado R.Crim.P. rule 29(b). Some, on the other hand, do not authorize this motion after the jury has returned, (see North Dakota, N.D.R. Crim.P., rule 29.)

a jury in the first instance—either chooses to procrastinate or is prevented from acting by state law.

CONCLUSION

The instant case presents no basis, in law or reason, for creating an exception to *Burks* when the state sets aside a verdict by granting a new trial motion rather than a judgment of acquittal. In Louisana, in California, and in fact in the great majority of the states a trial judge in so acting is exercising an appellate standard review of the sufficiency of the evidence, regardless of the name which is given to his order.

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